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In the Supreme Court of the United States

OCTOBER TERM, 1976

A. E. BIDERMAN, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 536 F. 2d 820. The orders and opinion of the district court (Pet. App. 15a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on July 8, 1976 (Pet. App. 14a). The petition for a writ of certiorari was filed on August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the court of appeals erred in enforcing administrative subpoenas *duces tecum*, as modified by a protective order precluding the improper use of subpoenaed documents, without allowing pre-enforcement discovery or an evidentiary hearing on the alleged improper purpose for the subpoenas.

2. Whether the court of appeals erred in ruling on the purposes of the subpoenas in the absence of separately stated findings of fact and conclusions of law by the district court.

STATEMENT

Petitioners are land developers who were served with two administrative subpoenas *duces tecum* in the course of an investigation by the Department of Housing and Urban Development under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.* They contend that, before the subpoenas were enforced by the district court, they should have been afforded discovery and an evidentiary hearing on their claim that there was no legitimate purpose for the subpoenas.

1. The Interstate Land Sales Full Disclosure Act (the "Land Sales Act"), 82 Stat. 590, as amended by Pub. L. 93-383, 88 Stat. 736, 15 U.S.C. (and Supp. V) 1701 *et seq.*, prohibits a "developer" from selling or leasing any lot in any subdivision, by use of the mails or other instruments of interstate commerce, unless a "statement of record" is filed with the Secretary of Housing and Urban Development and a "printed property report" is furnished to prospective purchasers. 15 U.S.C. 1703(a)(1), 1704-1707. It is also unlawful for any developer to defraud or deceive a purchaser. 15 U.S.C. 1703(a)(2). If a property report is not given to a purchaser before he signs an agreement to purchase,

the agreement is voidable at the option of the purchaser. 15 U.S.C. (Supp. V) 1703(b). A purchaser may also sue for money damages if there are untrue statements of material fact or omissions in the statement of record. 15 U.S.C. 1709.

The Secretary is authorized to bring an action to enjoin acts or practices that violate the Land Sales Act. 15 U.S.C. 1714(a). The Secretary also may make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of the Act and may "publish information concerning any such violations, and * * * investigate any facts, conditions, practices, or matters * * * to aid in the enforcement of the provisions of [the Act], in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which * * * [the Act] relates." 15 U.S.C. 1714(b).

An action for damages based on an untrue statement or omission in the property report must be brought within one year after the statement is or should have been discovered, and an action for rescission based on fraud or the failure of the developer to file a report must be brought within two years of the violation. 15 U.S.C. 1711. However, "[i]n no event shall any action be brought by a purchaser more than three years after the sale or lease to such purchaser." *Ibid.*

2. The challenged subpoenas were issued to petitioners in 1973, pursuant to 15 U.S.C. 1714(c), after HUD's Office of Interstate Land Sales Registration ("OILSR") received complaints concerning petitioners' land sales

activities.[1] Although petitioners partially complied with the subpoenas, they refused to provide OILSR officials with the names and addresses of purchasers or copies of the sales contracts and deeds (Pet. App. 4a).

When petitioners continued in their refusal to comply, the Secretary in September 1974 brought this action in the United States District Court for the Northern District of California, seeking judicial enforcement of the subpoenas. Attached as an exhibit to the petition for enforcement was the affidavit of John McDowell, Deputy Administrator of OILSR, which stated that the purpose of the HUD investigation was to determine whether petitioners had violated the registration requirements or fraud provisions of the Land Sales Act. The affidavit also stated that OILSR sought the names and addresses of petitioner's customers "so that they can be contacted about the specifics of the sales operations of the corporations," and that, if the OILSR investigation uncovered violations of the Land Sales Act, "the Secretary has the authority to bring an injunctive action or seek criminal sanctions pursuant to 15 U.S.C. §1714(a) and 1717" (Pet. App. 4a).

Petitioners opposed enforcement of the subpoenas and filed a counterclaim for declaratory and injunctive relief. They contended that HUD and OILSR wanted the customer lists only in order to notify customers that petitioners had failed to register with the agency, so that

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[1]There were two subpoenas. On January 22, 1973, OILSR issued a subpoena requiring petitioner A. E. Biderman to appear to testify and to produce certain documents pertaining to the sales activities of petitioners Priority Investments, Inc. (Washington), Peerless Research, Inc., and Capital Land Investments, Inc. On July 12, 1973, OILSR issued a second subpoena requiring petitioner Richard Yagle to appear to testify and to produce certain documents pertaining to the sales activities of petitioner Priority Investments, Inc. (California) (Pet. App. 3a-4a).

those customers could rescind their contracts and sue for damages (15 U.S.C. (Supp. V) 1703(b), 1709), and that those purposes were illegitimate because the limitations periods for such actions had run.[2] Petitioners also argued that the only civil remedy available to the Secretary, an injuction against sales violating the Land Sales Act (see 15 U.S.C. 1714(a)), was not available because petitioners had voluntarily ceased selling land (Pet. App. 6a-7a).

3. The district court summarily enforced the subpoenas (Pet. App. 19a-20a) and dismissed petitioners' counterclaim (Pet. App. 15a-18a), finding that the provisions of 15 U.S.C. 1714(b) concerning publication of information authorized the Secretary to inform customers about petitioner's possible violations of the Land Sales Act. Petitioners' request for an evidentiary hearing or pre-enforcement discovery also was denied.

The court of appeals affirmed the enforcement of the subpoenas,[3] with the addition of a limited protective order precluding OILSR officials from "advising [petitioners'] customers that they have a right to rescind

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[2]Petitioners submitted affidavits stating that the last sale of real property by petitioner Peerless Research was on or about January 19, 1973, the last sale by petitioner Priority Investment (California) was on or about April 13, 1971, and the last sale by petitioner Priority Investments (Washington) was on or about June 29, 1971. This information indicated that the limitations period in 15 U.S.C. 1711 had expired and that the customers could no longer rescind their contracts or recover damages. See *Jacobsen* v. *Woodmoor Corp.*, 400 F. Supp. 1 (W.D. Mo.); *Hall* v. *Bryce's Mountain Resort, Inc.*, 379 F. Supp. 165 (W.D. Va.); *Melhorn* v. *Amrep Corp.*, 373 F. Supp. 1378 (M.D. Pa.).

[3]The court of appeals' disposition, enforcing the subpoenas as modified by the protective order, necessarily affirmed the dismissal of petitioners' counterclaims seeking declaratory and injunctive relief against the subpoenas.

their contracts and recover back any money paid thereunder" (Pet. App. 13a).[4] Viewing the case under the well-settled standards of *United States* v. *Powell*, 379 U.S. 48, 57-58, the court found that the record disclosed two legitimate purposes for the subpoenas. First, the court ruled that the "names of past customers are relevant to an investigation which has an objective of obtaining injunctive relief because it is important to ascertain how [petitioners] secure sales leads and what sales techniques are employed" (Pet. App. 8a). Petitioners' claim of mootness was rejected as a defense to an injunctive suit under 15 U.S.C. 1714(a), since to establish mootness petitioners would have to demonstrate at trial "that there is no reasonable expectation that the wrong will be repeated." *Ibid.* Second, the court found that petitioners' customer lists "are relevant to the legitimate purpose of accumulating information so that the Secretary can recommend future legislation," as authorized by 15 U.S.C. 1714(b). *Ibid.*

The court of appeals also upheld the district court's refusal to accord petitioners an evidentiary hearing or pre-enforcement discovery. Relying on its decision in *United States* v. *Church of Scientology of California*, 520 F. 2d 818 (C.A. 9), the court concluded that, in the circumstances of this case, "[t]here is no indication whatsoever that anything would have been accomplished by an evidentiary hearing" (Pet. App. 12a). Since the investigation had been initiated at the request

[4]The court issued the protective order because the record disclosed that OILSR officials may have had, in addition to several legitimate purposes, the improper intention to write to petitioners' customers to inform them that they could void their contracts and receive cash refunds—advice that the court found "was quite probably erroneous and was not authorized by the law" since the statute of limitations had run on these purchaser rights in this case. (Pet. App. 12a).

of aggrieved outside parties rather than by the agency itself, there was little chance of a bad faith investigation (Pet. App. 11a). But more importantly, the court found that the affidavits before the trial court clearly established that there were one or more legitimate purposes for the administrative subpoena, and that it is not "a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena. *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Weld* [*sic*] v. *United States*, 362 F. 2d 206 (9th Cir. 1966)" (Pet. App. 12a).

ARGUMENT

The court of appeals' decision is correct and involves only the application of settled legal principles to the particular factual setting of this case. Moreover, the protective order imposed by the court of appeals expressly limits the use of the subpoenaed documents and eliminates any basis for petitioners' concern that OILSR officials might use the customer lists for an improper purpose.

1. Petitioners claim (Pet. 18-21) that the court of appeals approved a "unique" procedure that deprived them of an opportunity to show that the sole reason for the OILSR subpoenas was illegitimate. They also contend that the enforcement procedures sanctioned by the courts below are at odds with the procedures outlined in *United States* v. *McCarthy*, 514 F. 2d 368 (C.A. 3), and *United States* v. *Church of Scientology of California, supra*, as well as other cases involving Internal Revenue Service summonses.

These contentions are incorrect. In denying pre-enforcement discovery, the court of appeals followed the general rule that, "[i]n contrast to the procedure in

ordinary civil cases, discovery in a summary summons enforcement proceeding is the exception rather than the rule." *United States* v. *Church of Scientology of California, supra,* 520 F. 2d at 824.[5] Moreover, "not every summons enforcement proceeding will require an evidentiary hearing" (*United States* v. *McCarthy, supra,* 514 F. 2d at 373), and the court correctly determined that no purpose would have been served by a hearing or discovery here. See *Federal Trade Commission* v. *Browning,* 435 F. 2d 96, 104 (C.A. D.C.). The affidavits before the trial court conclusively established that there were one or more legitimate purposes for the OILSR subpoenas, including the acquisition of information by the Secretary for a possible injunctive suit under 15 U.S.C. 1714(a). Although there may also have been an improper purpose underlying the OILSR subpoenas, as petitioners claim and the court of appeals believed, that would not have justified a denial of enforcement even if proven in the district court (*Donaldson* v. *United States,* 400 U.S. 517, 532-533), and the protective order provides concrete assurance that the subpoenas will not be used for that purpose.

2. Equally unpersuasive is petitioners' claim (Pet. 22) that the court of appeals could not properly rule on the purposes behind the OILSR subpoenas in the absence of express findings of fact and conclusions of law by the district court. Subpoena enforcement proceedings are summary in nature (see *United States* v. *Church of Scientology of California, supra,* 520 F. 2d

[5]None of the cases cited by petitioners (Pet. 18-21) endorses a rigid rule requiring discovery and an evidentiary hearing in every subpoena enforcement proceeding. Whether an evidentiary proceeding is necessary prior to summary enforcement must be judged on the facts of each case. Thus, contrary to petitioner's assertions, there is no conflict among the circuits on this issue.

at 824), and the record before the court of appeals adequately set forth the essential facts, including the reasons for issuance of the subpoenas.[6] Indeed, the court was able to conclude, on the basis of the record, that petitioners' objections were valid, and it therefore entered a protective order. The affidavits of OILSR officials, however, also established the existence of independent, legitimate purposes for the subpoenas, which justified their enforcement. See *Pacific Westbound Conference* v. *United States,* 332 F. 2d 49, 53-55 (C.A. 9).[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Contrary to petitioners' contentions (Pet. 22), the district court met the requirements of Fed. R. Civ. P. 52(a) when it set forth its findings and conclusions in the Order Dismissing Counterclaim (Pet. App. 15a-17a). See *Trentman* v. *City and County of Denver, Colo.,* 236 F. 2d 951 (C.A. 10), certiorari denied, 352 U.S. 943; *Elam* v. *United States,* 250 F. 2d 582 (C.A. 6), certiorari denied, 358 U.S. 848; 5A Moore's *Federal Practice* para. 52.01[1], [5] (1975).

[7]In light of the court of appeals' enforcement of the subpoenas, as modified, for reasons stated in a detailed opinion, petitioners' claim (Pet. 18, 22) that the court failed to adjudicate the appeal from the dismissal of their counterclaim is insubstantial. See n. 3, *supra.*